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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

KRISTINE M. GEBBIE, Assistant Director, Human Resources, Administrator, Health Division of the State of Oregon,

Petitioner,

v.

WILLIAM J. BRADY, M.D.,

Respondent.

On Petition for a writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF OF PETITIONER

DAVE FROHNMAYER
Attorney General of Oregon
JAMES E. MOUNTAIN, JR.
Deputy Attorney General
VIRGINIA L. LINDER *
Solicitor General
MICHAEL D. REYNOLDS
Assistant Solicitor General
RIVES KISTLER
Assistant Attorney General
400 Justice Building
Salem, Oregon 97310
Phone: (503) 378-4402
Counsel for Petitioner

* Counsel of Record

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REPLY BRIEF OF PETITIONER

In his brief in opposition, Brady raises primarily two arguments. First, he claims that the court of appeals stated the correct legal test for determining when a liberty interest is implicated and what procedures are required in a liberty interest hearing. The state has explained in its petition for certiorari that the court of appeals' legal standard improperly would recognize a liberty interest even when an employee is not foreclosed from pursuing his chosen career or has not incurred similar substantial disability beyond that inherent in a discharge from visible public office. The state also argued that the lower court's test improperly would permit a jury to decide that any procedural deficiency, no matter how minor, equals a due process deprivation. Brady's

arguments on these points do not raise any new matter and, in accordance with Rule 22.5, the state does not offer any argument in reply.

Brady argues secondly, however, that even if the Ninth Circuit announced the wrong test, this Court should deny certiorari because the result in this case would not change under the test the state advocates. Brady asserts that the jury was instructed in accordance with the state's theories, including the contention that the jury had to find that Gebbie's charges foreclosed Brady's freedom to take advantage of future employment opportunities; he also claims that the Ninth Circuit expressly and properly concluded that there was "abundant evidence" to support the jury's verdict. Brief in Opp. at 16-19.

Assuming, arguendo, that Brady were correct in his "no harm, no foul" argument, Brady's argument is not a reason for denying certiorari. This Court does not grant certiorari to correct erroneous results, nor should it decline to hear important legal questions even if this Court's review may lead to affirmance of the judgment below. This case illustrates the wisdom of the Court's approach to granting certiorari. The Ninth Circuit's opinion has far-reaching ramifications beyond the mere outcome of this case. If the Ninth Circuit has announced an incorrect standard for determining when a party has proven the deprivation of a liberty interest, or if it has announced a standard that converts every claimed procedural deficiency, no matter how minor, into a jury question, then the error will repeat itself. State governments will be exposed to potentially unlimited damages in cases that should never have been submitted to juries in the first place. As significant, the Ninth Circuit's erroneous legal rules will fuel improper jury instructions in future cases. Apart from who wins or loses this case, the legal questions presented are important and merit this Court's certiorari review.

Brady, moreover, is wrong when he asserts that the Ninth Circuit both expressly and properly concluded that the evidence supported the jury's findings on all elements on which it had been instructed. As the Ninth Circuit viewed the essential elements of a liberty interest claim, an at-will public official need not demonstrate foreclosure from future employment opportunities, or any other similar disability. Instead, the court of appeals held discharge and damage to reputation were enough. *Brady v. Gebbie*, 859 F.2d 1543, 1552-54 (9th Cir., 1988). *See also*, Brief in Opp. at 15. Thus, having decided that a disability like foreclosure from future employment is not an element of a liberty interest deprivation, the court did not inquire, let alone decide, whether the evidence was adequate to submit to the jury on that issue.

Brady's assertion that the court found "abundant evidence of foreclosure of employment opportunities" (Brief in Opp. at 17), not only is incorrect, it subtly and significantly recasts the relevant inquiry. The element on which the jury had been instructed, and which the trial court in denying the state's motion for directed verdict had to conclude the evidence supported, was whether Gebbie's "charges imposed a stigma [on Brady] that foreclosed his freedom to take advantage of other employment opportunities." *See* Brief in Opp. at 18. The court of appeals observed only that "[t]wo witnesses * * * indicated they * * * would be unlikely to use Brady again" as an expert witness. 859 F.2d at 1558.[1]

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[1] In the petition for certiorari, the state summarizes the evidence concerning the impact Gebbie's statements had on Brady's reputation and future employment. Pet. Cert. at 18-19. Brady does not take issue with the state's summary. As we note after discussing this evidence, the court of appeals considered the evidence of impact on future employment only in rejecting the state's motion for judgment notwithstanding the verdict or remittitur, not in defining the elements of a liberty interest deprivation or the adequacy of the evidence to survive a directed verdict. The court of appeals' discussion of the sufficiency of the evidence to submit the case to the jury occurs earlier at 859 F.2d 1552-1554.

This evidence simply was insufficient to find that Brady's "freedom to take advantage of other employment opportunities"—*i.e.* his freedom to pursue his profession—had been impaired in any significant way by Gebbie's public statements. Although Brady proved that he may have lost one or two commissions as an expert witness, even he did not dispute that he had managed to establish a lucrative private pathology practice. This evidence fell far short of implicating an interest of constitutional dimension, at least under a correct legal formulation of what a high ranking public official must show to establish a deprivation of liberty.

Brady's new arguments opposing certiorari thus raise illusory objections to review. Even if the jury arguably heard the case under a correct instruction on liberty interest, the fact remains that the case should never have been submitted to the jury at all. The Ninth Circuit's contrary conclusion is predicated on a liberty interest test that is extraordinary lenient and legally insufficient.

Brady ultimately does not answer the challenge posed by the Ninth Circuit's decision: how government can discharge high ranking officials and explain its actions to the public without creating opened-ended exposure. Instead, Brady's brief opposing certiorari demonstrates the danger. A clever trial lawyer can rephrase nearly any neutral public explanation of a discharge decision into stigmatizing terms (e.g. Brady's counsel recharacterizes the allegation that Brady maintained a private account to fund office amenities as an allegation that he "systematically stole" government funds, Brief in Opp. at 17). Thus, through the efforts of a skillful lawyer, innocuous facts are spun into inflammatory ones, objective assessments are characterized in emotion-laden terms, and twelve jurors are the final arbiters of what becomes a debate over the wisdom or non-wisdom of governmental judgments that a high-ranking, at-will official no longer inspires the public's trust and confidence. In the end, just

as Brady argues should be the case here, nearly every set of facts gives rise to a jury question, and nearly every jury verdict is left undisturbed on appeal. The state seeks the Court's review because this result does not reflect a correct balance of the interests the constitutional liberty clause was intended to secure, and because the consequences are forcefully at odds with the public's interests.

Respectfully submitted,

DAVE FROHNMAYER
Attorney General of Oregon
JAMES E. MOUNTAIN, JR.
Deputy Attorney General
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